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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6739

STEVEN COSTARELLI,
APPELLANT,

v.

COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

ON APPEAL FROM THE MUNICIPAL COURT OF THE CITY OF BOSTON

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

I. Opinion Below

No opinion, findings of fact, or conclusions of law were reported by the Municipal Court of the City of Boston.

II. Statement With Respect to Jurisdiction

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(2). The appellant was convicted and sentenced in the Boston Municipal Court on February 27, 1974. (App. 7a).[1] A notice of appeal to the United States Supreme Court was filed in the lower court on May 16, 1974. (App. 8a). The appellant's jurisdictional statement was filed in this Court on May 20, 1974, and this Court granted the motion for leave to proceed in *forma pauperis* and postponed jurisdiction on October 21, 1974.

To the jurisdictional statement the Commonwealth of Massachusetts filed a motion to dismiss pursuant to Rule 16(1)(a) of the Rules of this Court, and, in this portion of the Brief for the Appellee, in accordance with Rule 16(6), the appellee addresses the question of jurisdiction, suggesting by way of introduction, that this Court does not have jurisdiction of the appeal pursuant to 28 U.S.C. §1257(2).[2]

The jurisdiction of this Court to review decisions of state courts derives from §1257 which provides in pertinent part that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

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[1] "App. ___" references are to the separate appendix filed pursuant to Rules 26 and 36. The appendices in this Brief will be cited as "Appendix A," etc.

[2] The appellee recognizes that this Court may treat the case as one on petition for writ of certiorari in the event that it is determined that the appeal was improvidently taken. 28 U.S.C. §2103. See *Anonymous* v. *Baker*, 360 U.S. 287, 290 (1959). Notwithstanding, the appellee suggests that the arguments contained in this Brief with respect to "finality" and "highest court of a State" prerequisites to jurisdiction are and would be substantially appropriate in opposition to a grant of certiorari.

> (1) • • •
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari . . . where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States. 28 U.S.C. §1257.[3]

In this particular case it appears that the "judgment or decree" which is the basis of appeal is a conviction and sentencing (or judgment of "guilty") in the Municipal Court of the City of Boston.[4] The appellee suggests that this "judgment" is an inadequate basis for jurisdiction under §1257 because: (1) it is not a "final" judgment; and, (2) it is not a judgment rendered by the highest court of Massachusetts in which a decision could be had.[5]

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[3] See note 2, *supra.*

[4] In Massachusetts practice it appears that the "judgment" in a criminal case is the sentence. *Commonwealth* v. *Locke*, 338 Mass. 682, 684 (1959), citing, *inter alia*, *Birnbaum* v. *United States*, 107 F.2d 885, 886-87 (4th Cir. 1939). This definition appears to be consistent with this Court's pronouncement in *United States* v. *Hark*, 320 U.S. 531 (1944).

[5] The appellee further suggests that the judgment in this case is inadequate to be the basis of *appeal* under sub-section (2) of §1257 because the judgment does not draw in question the validity of a "*statute* of any state." Appellee suggests that the appeal may be argued as drawing into question a right, privilege or immunity; however, the Massachusetts procedure for providing a jury trial to an accused is not explicitly defined or prescribed by a particular statute. Indeed, the appellant has not specified a Massachusetts statute as being in question. Rather, the appellant alleges that seven

Appellee further notes that upon application to this Court for review of the judgment of a state court, it is the petitioner's burden to affirmatively establish jurisdiction. *Gorman* v. *Washington University,* 316 U.S. 98 (1942).

A. *The "Judgment" Lacks Prerequisite Finality.*

This Court has stated that "no self-enforcing formula defining when a judgment is 'final' can be devised." *Republican Gas Co.* v. *Oklahoma,* 334 U.S. 62, 67 (1948). And, indeed, as early as 1869 the Court implicitly rejected a simple mechanical formula with respect to finality, speaking rather of "the *degree* of finality essential to the right of appeal. . . ." *Thompson* v. *Dean,* 74 U.S. 342, 345-46. (Emphasis added.)[6] However, despite the absence of

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Massachusetts statutes and one constitutional provision "comprise the framework of Massachusetts' two-tier trial de novo criminal procedure. . . ." Brief for the Appellant, p. 9.

There is no Massachusetts statute which prohibits a jury in the Boston Municipal Court or, alternatively, directs that criminal defendants of particular categories be tried without jury in the first instance. Rather, the procedure is, it is argued, a practice which develops because of the definition of jurisdiction of the district and municipal courts in Massachusetts which happen to be without jury, in the first instance. The Massachusetts procedure appears to be more in the nature of custom and usage (see 42 U.S.C. §1983) and, as such, were the briefs and papers in this case to be treated as a petition for writ of certiorari, the appellee would suggest that the petition be denied because, among other reasons, the nature of the right or immunity claimed by the appellant would be more fully and appropriately developed in a proceeding based upon 42 U.S.C. §1983 in a federal court.

[6] No distinction is being made by the appellee in this brief with respect to the different jurisdictional statutes which have been considered by this Court in the cited decisions in view of the following statement by this Court:

> The provision of §1257 that only "Final Judgments or Decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . ." has always been carried in almost identical language since the judiciary act of 1789, 1 Stat. 85, §25.

Building Union v. *Leadbetter Co.,* 344 U.S. 178 (1952), modified, *Construction Laborers* v. *Curry,* 371 U.S. 542, 552 (1963).

absolutes, there appear to be certain principles germane to this Court's determination of whether a state judgment is final for purposes of review under §1257:

(1) The question of "finality" is one of purely federal law. *Gotthilf* v. *Sills*, 375 U.S. 79 (1963);

(2) The designation given to the "judgment" by state procedure is not controlling upon this Court. *Gospel Army* v. *Los Angeles*, 331 U.S. 543 (1947); *Department of Banking* v. *Pink*, 317 U.S. 264 (1942);

(3) The judgment must leave nothing more to be decided. *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69 (1946); *Clark* v. *Williard*, 292 U.S. 112 (1934);

(4) The judgment must be an effective determination of the litigation and subject to no further review or correction in any other state tribunal. *Richfield Oil Corp., supra; Market Street Railway Co.* v. *Railroad Commissioner of California*, 324 U.S. 548 (1945);

(5) The issue of finality will be resolved not only by examination of the entire record but, when necessary by resort to local law to determine *what effect* the judgment has under the state rules of practice. *Gospel Army, supra; Richfield Oil Corp., supra;*

(6) This Court uniformly insists that further available appellate review be pursued within the state court system. *Banks* v. *California*, 395 U.S. 708 (1969); and,

(7) History bears ample testimony that the Congressionally-imposed limitations upon this Court's power of review is an important factor in securing harmonious state-federal relations. *Republican Natural Gas Co.* v. *Oklahoma, supra.*

Upon examination of the judgment in this case, the appellee suggests that it fails to satisfy the jurisdictional requirement of finality in that: (a) the judgment is not an "effective determination of the litigation"; it cannot be said that the judgment "leaves nothing more to be decided" and, (b) there are further possible avenues of appellate review with respect to the judgment which have not been pursued.

1. *The Judgment Of The Boston Municipal Court Is Not An Effective Determination Of The Litigation.*

In Massachusetts there are four "levels" of criminal procedure, or, more precisely, four courts which have cognizance of criminal matters: the District Courts (Mass. Gen. Laws ch. 218, §26),[7] the Superior Court (Mass. Gen. Laws ch. 212, §6), the Massachusetts Appeals Court (Mass. Gen. Laws ch. 211A), and the Supreme Judicial Court Mass. Gen. Laws ch. 211, §5).[8] A Massachusetts defendant who is convicted of a crime before a district court has several options.[9] He may, of course, accept his sentence or disposition as final and do nothing; he may appeal the finding of guilty to the Superior Court, with or without jury.

[7] There is considerable justification for treating the Massachusetts District Courts and the Boston Municipal Court as different systems. The Municipal Court of the City of Boston was established by statute in 1821, and the Massachusetts District Courts were established by statute in 1893. See, e.g., Seventeenth Annual Report to the Justices of the Supreme Judicial Court, p. 4 (1973). However, for purposes of this immediate discussion, it is suggested that they may be considered as equivalent courts. See Brief for the Appellant, p. 2; Appendix A, n. 1.

[8] An explanation of the jurisdictional bases for each of these Massachusetts courts is included as Appendix A to this brief, *infra*.

[9] It should be noted that the Commonwealth has no right of appeal in any criminal matter in any court of the Commonwealth except for a limited right to appeal in felony cases from decisions by the Superior Court with respect to specific pre-trial matters. See Mass. Gen. Laws ch. 278, §28E.

Mass. Gen. Laws ch. 278, §18. Additionally, defendants convicted of less serious crimes (including Mass. Gen. Laws ch. 90, §24, the lower court conviction in the instant case), depending upon the court of conviction, have available several options for jury trial within the district court system.[10]

Appellee's research discloses that the appeal by a criminal defendant in Massachusetts who had first been convicted in a municipal court without jury, was first designated *de novo* in the case of *Sullivan* v. *Adams,* 69 Mass. 476 (1855):

> [W]e think that when an appeal is granted, it means that there shall be a full trial in the court appealed to, *de novo,* and thus the object of giving the appeal will be accomplished. 69 Mass. at 478.

It was further explained that such an appeal "opens to [the appellant] . . . the whole case, as to the law, the facts and the judgment." *Commonwealth* v. *O'Neil,* 72 Mass. 343 (1856).[11]

More recently the Massachusetts Supreme Judicial Court has stated its position with respect to the nature of the *de novo* trial:

> It is reasonable to conclude that the Legislature intended that, upon appeal [Mass. Gen. Laws ch. 278, §18], *the question of guilt, the sentencing power and all related matters* be transferred to the Superior

[10] See Mass. Gen. Laws ch. 218, §27A and ch. 278, §18A which are reprinted in Appendix B.

[11] It should be noted that the "appeal" provision considered by the Supreme Judicial Court in *Commonwealth* v. *O'Neil,* was "Rev. Sts. c. 85, §28, and c. 138, §1," a predecessor, of identical substance, it is suggested, to Mass. Gen. Laws, ch. 278, §18.

> Court for *determination* completely divorced from the record of the prior trial. *Mann* v. *Commonwealth*, 359 Mass. 661, 664 (1971). [Italics added.]

And, appellee suggests that this available and elected *redetermination* of the question of guilt, sentencing and all related matters of appellant's district court trial contra-indicates that the district court "judgment" be construed as an effective determination of the litigation. The judgment in appellant's district court case was, and is, subject to further review in a state tribunal, as it is subject to an available *redetermination*.

2. *Further Appellate Review Is Available Within The Massachusetts Court System.*

The appellant had available to him a traditional avenue of obtaining appellate review of the action of the district court in denying the motion for jury trial. This constitutional issue could have been raised in the Massachusetts Superior Court by motion to dismiss the complaint prior to trial.[12] If such a motion were made, and subsequently denied, and if the appellant were then found guilty, he would have had available to him an opportunity for appellate review of the ruling on this motion as a matter of right by saving and perfecting exceptions thereto and proceeding with the same to the Massachusetts Appeals Court, and, possibly to the Supreme Judicial Court. See *Whitmarsh* v. *Commonwealth*, 1974 Mass. Adv. Sh. 1403, 316 N.E.2d 610 nn. 1, 3.

Admittedly, the availability of this ordinary review under the method of exceptions and appeal would be viable only in the event that the appellant were not acquitted, and

[12] "The foundation of the jurisdiction of the Superior Court in a criminal case coming before it on appeal is the complaint made in the District Court." *Commonwealth* v. *Duggan*, 257 Mass. 465, 69 (1926).

that his properly presented motion to dismiss the complaint had been denied at the superior court level. However, the Commonwealth suggests that an appellant to this Court under 28 U.S.C. §1257(2) must avail himself of the appellate remedies that exist at the state level for consideration of the constitutional issues that are presented to this Court.

The appellee recognizes that this Court's decision in *Largent* v. *Texas*, 318 U.S. 418 (1943), appears to be authority contrary to the position argued by appellee. In *Largent* it is reasonable to conclude that a rule was established by which a lower court's judgment would be considered "final" for purposes of §1257 review if the state's procedure provided no method of reviewing the defendant's conviction *on the record made in the lower court*. And, appellee recognizes that the statement of the Massachusetts Supreme Judicial Court in *Mann* v. *Commonwealth*, *supra*, appears to indicate that the superior court procedure will not constitute a review on the district court record ("... completely divorced from the record of the prior trial," 359 Mass. at 664.

However, appellee suggests that a mechanical application of the language of *Largent* would ignore the substantive nature of the Massachusetts procedure and the substantive fact to which there seems no dispute: the litigation in the district court has not, at the election of the appellant in this case, been effectively determined. Although the *record* of the district court may be unreviewable in the Superior Court, the substantive *decisions* made by the district court seem to be substantively non-final.

B. *The Judgment Herein Appealed Is Not A Judgment Rendered By The Highest Court Of Massachusetts In Which A Decision Could Be Had.*

It is clear from the decisions of this Court that a judgment need not be from a state's highest court (by whatever

name under local practice) in order to be appealable under 28 U.S.C. §1257(2). See *Powell* v. *Texas*, 392 U.S. 516 (1968); *Grovey* v. *Townsend*, 295 U.S. 45 (1935). The test seems not to be one of the particular description or designation which may be applied to the tribunal by state statute, but rather, whether the possibilities afforded by state procedure for review by all state tribunals have been exhausted:

> * * *
>
> Hence, it is the last state tribunal—* * *—to which the cause could be brought for review which is the 'highest court of a state in which a decision could be had' within the meaning of the jurisdictional statute. . . . *Gorman* v. *Washington University*, 316 U.S. at 100-01.

The appellee suggests that the "decisions" of the Boston Municipal Court in this case are two:

> (1) the adjudication of the appellant's guilt; and,
> (2) the denial of the appellant's motion for a jury trial.

And, the appellee suggests that each of these decisions is susceptible of further review and revision under Massachusetts statutes and practice. The adjudication of guilt can be re-litigated in the Superior Court before a jury of twelve, or re-litigated in the Boston Municipal Court before a jury of twelve. Re-litigation is also available in either of these courts, without a jury. The defendant may, if convicted in either of these courts, then take an appeal, as of right, to the Massachusetts Appeals Court and, or alternatively, apply for further or substituted hearings before the Massachusetts Supreme Judicial Court. See discussion *infra*, Appendix A.

As to the question of the propriety of the Boston Municipal Court's ruling upon the motion for jury trial, the question may be raised, as of right, in the Superior Court (see Appendix A; *Whitmarsh* v. *Commonwealth, supra*) and again, as of right, in either the Appeals Court or the Supreme Judicial Court.

In brief, the two decisions made by the Boston Municipal Court are not "the final word of a final court." *Market Street Railway Co.* v. *Railroad Commission of California*, 324 U.S. at 551. The decision as to the appellant's guilt is subject to redetermination; the decision upon the motion for jury trial is subject to review, correction and modification. The appellee suggests that the decision of the Boston Municipal Court did not dispose of the charge and is, in this respect, distinguishable from *Largent* v. *Texas, supra*.

not convinced to me

III. Constitutional and Statutory Citations

The constitutional provisions and statutes involved in this case are the following:

Fourteenth Amendment of the United States Constitution, Section I;
Article XII, Constitution of Massachusetts;
Title 28, United States Code, Section 1257;
Massachusetts General Laws, Chapter 218, Section 27A;
Massachusetts General Laws, Chapter 278, Section 18; and,
Massachusetts General Laws, Chapter 278, Section 18A.

Each is set forth in Appendix B, *infra*.

IV. Question Presented

Whether or not the Massachusetts criminal jury procedure adequately complies with the Fourteenth Amendment requirement that an accused be afforded the right to trial by jury in state criminal proceedings.

V. Statement of the Case

Appellant Steven Costarelli was complained against in the Municipal Court for the City of Boston on January 23, 1974, for violation of Mass. Gen. Laws, Ch. 90, §24, commonly referred to as "unauthorized use of automobile". (App. 6A). On that date, the appellant, then defendant, pleaded not guilty and the trial of the case was scheduled for February 6, 1974. On February 6, 1974, prior to trial, the appellant filed a "Motion for Jury Trial," and the case was, on that date, continued for trial until February 27, 1974. (App. 6A). On February 27, 1974, the case was called for trial, the motion for jury trial was denied, the appellant was found guilty, and the appellant was sentenced to a house of correction for a term of one year. (App. 6A-7A). On that date and at that time the defendant "appealed" the finding of guilty, although the record does not disclose whether the appeal was taken pursuant to Mass. Gen. Laws, Ch. 278, §18, or Mass. Gen. Laws, Ch. 278, §18A. (See Appendix B.) The record before this Court is devoid of any indication of the further disposition of the case.

VI. Summary of Argument

1. The right of jury trial in criminal cases is a fundamental right, guaranteed to defendants in state courts by virtue of the Fourteenth Amendment. *Duncan* v. *Louisiana*,

391 U.S. 145 (1968). However, *Duncan* did not make the rule of *Callan* v. *Wilson*, 127 U.S. 540 (1888), applicable to the states; that is, first-instance-every-instance jury trial is not mandatory in all state criminal proceedings. *Duncan* enunciated a right, without definitively establishing the mode in which the right is to be afforded state defendants, and the Massachusetts mode of criminal jury trial procedure complies with the *Duncan* requirement because it is a basic and fundamental mode; that is, a mode which has its roots clearly within the Anglo-American regime of ordered liberty in a constitutional-historical sense. The Massachusetts mode is clearly basic and fundamental because it antedated, and remained viable during, the colonial-constitutional period. Additionally, several states, including New Hampshire, Vermont, Connecticut, Rhode Island and Maine (as a District) employed a similar trial *de novo* procedure during the same period as a means of furnishing jury trial to defendants within their jurisdictions. Finally, the Massachusetts procedure is comparable to contemporary developing jury procedures in several states, and this Court has considered contemporary state practice as a principle of Fourteenth Amendment application.

2. This Court in the cases of *Duncan* v. *Louisiana*, *supra*, *Williams* v. *Florida*, 399 U.S. 78 (1970), and *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), analyzed certain traditional aspects of the jury-trial right with respect to the function and purpose of a jury in American jurisprudence. Appellee suggests that the primary purpose of the jury is to prevent governmental oppression by the interposition of the commonsense judgment of laypersons between an accused and his accuser, and by effecting community participation in the process of adjudication of guilt or innocence of an accused. Appellee further suggests that an accused in Massachusetts has an absolute

right to a jury, regardless of the "petty nature" of his offense, and that the *de novo* procedure, though possibly inconvenient to some, is beneficial to the large majority of defendants and contraindicates a suggestion of governmental oppression. The Massachusetts jury procedure fulfills the purpose and function of criminal jury trial in America.

3. The right to a speedy trial, a fundamental right, is not an appropriate issue in this case. If this Court determines that the concept of "jury" embraces first-instance-every-instance jury trial, then a consideration of the appellant's speedy-trial claim becomes unnecessary. Alternatively, should this Court agree that the Massachusetts criminal jury procedure complies with the *Duncan* requirement, the record in this case fails to disclose any measurable period of time which can be assessed against the criteria of *Barker* v. *Wingo*, 407 U.S. 514 (1972). Finally, the appellant has conceded that the "delay" in this case is "short". The appellant was not deprived a speedy jury trial.

4. The appellant's alternative contention with respect to the Double Jeopardy Clause is controlled by this Court's decisions in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), and *Colten* v. *Kentucky*, 407 U.S. 104 (1972). In Massachusetts, as was the case in Kentucky, a defendant in a criminal trial "appeals" to the second level of the two-tier system to receive a trial "in the criminal courts of general jurisdiction where the full range of constitutional guarantees is available." *Colten* v. *Kentucky*, 406 U.S. at 114. In Massachusetts, as was the case in Kentucky, the right to the second tier is absolute, and, at the defendant's behest, the lower court proceedings are "wiped out" entirely. On the basis of this Court's previous decisions, Massachusetts suggests that its *de novo* trial procedure does not violate the Double Jeopardy Clause.

VII. Argument

THE MASSACHUSETTS CRIMINAL JURY PROCEDURE ADEQUATELY COMPLIES WITH THE FOURTEENTH AMENDMENT REQUIREMENT THAT AN ACCUSED BE AFFORDED THE RIGHT TO TRIAL BY JURY IN STATE CRIMINAL PROCEEDINGS.

I. The Massachusetts Procedure Provides Jury Trial in a "Basic and Fundamental" Mode.

In *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), this Court, in examining a state's procedure which dispensed entirely with a jury trial in serious criminal cases,[13] stated the following:

> * * * Because we believe that a trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee. [Footnote omitted.] 391 U.S. at 149.

The Commonwealth of Massachusetts suggests, at the outset, that *Duncan* did not establish a requirement that state jury procedures conform to all previous decisions of this Court interpreting the right to jury trial guaranteed to defendants in criminal cases in federal courts by Ar-

[13] "None of these cases [*Maxwell* v. *Dow*, 176 U.S. 581 (1900); *Palko* v. *Connecticut*, 302 U.S. 319 (1937); and *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934)], however, dealt with a State which had purported *to dispense entirely* with a jury trial in serious criminal cases." 391 U.S. at 154-55. [Italics added.]

ticle III of the United States Constitution and by the Sixth Amendment.[14] This argument is written upon that understanding and assumption, with the proviso that if this Court is to hold that *Duncan* requires the states to conform to the cases that determine federal jury-trial right, then the doctrine of *Callan* v. *Wilson*, 127 U.S. 540 (1888), should be re-assessed, or, alternatively, made explicit.[15] In brief, appellee argues, on the basis of its understanding, that *Duncan* secured a right, without defining precisely the mode in which it shall be enjoyed.[16]

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[14] The appellee recognizes that its position is not free from contrary interpretation and suggests that the Massachusetts Supreme Judicial Court has reviewed the alternatives and that the same are contained in succinct and fair summary in the case of *Whitmarsh* v. *Commonwealth*, *supra*, at 1412-16. We concur with the views of Mr. Justice Powell as expressed in his concurring opinion in *Johnson* v. *Louisiana* and *Apodaca* v. *Oregon*, 406 U.S. 356, 369-77 (1972), wherein he stated:

> But it is the Fourteenth Amendment, rather than the Sixth, that imposes upon the States the requirement that they provide jury trials to those accused of serious crimes. This Court has said, in cases decided when the intendment of that Amendment was not as clouded by the passage of time, that due process does not require that the States apply the federal jury-trial right with all its gloss.

[15] * * * It seems very unlikely to us that our decision today will require widespread changes in state criminal processes. First, our decisions interpreting the Sixth Amendment are always subject to reconsideration, a fact amply demonstrated by the instant decision.* * * 391 U.S. at 158-59, n. 30.

[16] In *Jones* v. *Robbins*, 8 Gray 329 (1857), in which the principle question involved was whether a person could be sentenced to state prison without a grand jury indictment, the Supreme Judicial Court said:

> * * *
>
> The last clause, which seems to have been added for greater caution, prohibiting the legislature from making any law which shall subject any person to a "capital" or "infamous punishment," excepting for the government of the army and navy, without trial by jury, is somewhat more explicit than the preceding clause, "judgment by his peers," and may be equivalent to the clause in the sixth article of amendment of the Constitution of the United States, declaring that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public

Appellee suggests that the conclusion of *Duncan* seems to derive from an examination and application of criteria which had previously served as the basis for this Court's determination that various rights extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings were also to be protected against state action by the Fourteenth Amendment. 391 U.S. 147-49. Specifically, the Court re-visited earlier "Fourteenth Amendment" decisions, and said:

> * * * The question has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those " 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' "

trial, by an impartial jury." We believe it has been so practically understood; and where, by the terms of any law, a justice of the peace or police court has been authorized to hear and pass sentence, it has always been accompanied by a right of appeal. And we believe it has been generally understood and practised here and in Maine, and perhaps in other states having a similar provision, that as the object of the clause is to secure a benefit to the accused, which he may avail himself of or waive, at his own election; and as the purpose of the provision is to secure the right, without directing the mode in which it shall be enjoyed; it is not violated by an act of legislation, which authorizes a single magistrate to try and pass sentence, provided the act contains a provision that the party shall have an unqualified and unfettered right of appeal, and a trial by jury in the appellate court, subject only to the common liability to give bail, or to be committed to jail, to ensure his appearance and to abide the judgment of the court appealed to. This is a necessary inconvenience, as is also the delay of the trial till the sitting of such court they are the same and no greater than they would be in case the magistrate, instead of passing sentence, should, on examination, bind the accused over, or, as the necessary alternative, commit him to jail. Such seems to have been the construction of a similar provision in other states. *Emerick* v. *Harris*, 1 Binn. 416. *Murphy* v. *People*, 2 Cow. 815. *Jackson* v. *Wood*, 2 Conn. 819. *Beers* v. *Beers*, 4 Conn. 535. *Sullivan* v. *Adams*, 3 Gray 477. It appears to us, therefore, that such a provision is not void, as a violation of that clause, which, in criminal cases, secures to the accused a right of trial by jury. *Id.* at 341-42.

> *Powell* v. *Alabama*, 287 U.S. 45, 67 (1932),[17] whether it is "basic in our system of jurisprudence," *In re Oliver*, 333 U.S. 257, 273 (1948); and whether it is "a fundamental right, essential to a fair trial," *Gideon* v. *Wainwright*, 372 U.S. 335, 343-344 (1963); *Malloy* v. *Hogan*, 378 U.S. 1, 6 (1964); *Pointer* v. *Texas*, 380 U.S. 400, 403 (1965).* * *

391 U.S. at 148-49.

The Court noted that recent cases had varied from the "essence of a scheme of ordered liberty" test (*Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937)), and

> . . . proceeded upon the valid assumption that state criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental — whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty. * *[18]

391 U.S. 149-50 n. 14, and further,

> * * * Of each of these determinations [19] that a constitutional provision originally written to bind the Federal Government should bind the States as well it might be said that the limitation in question is not

[17] Quoting from *Herbert* v. *Louisiana*, 272 U.S. 312, 316 (1926).

[18] The Court referenced to the following cases: *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Griffin* v. *California*, 380 U.S. 609 (1965); *Robinson* v. *California*, 370 U.S. 660 (1962); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967); *In re Oliver*, 333 U.S. 257 (1948); *Pointer* v. *Texas*, 380 U.S. 400 (1965); and, *Washington* v. *Texas*, 388 U.S. 14 (1967).

[19] Cases in footnote 18, *supra*.

> necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American States. *Ibid.*

Appellee suggests that the Court then, in *Duncan*, based upon this initial definition of "fundamental", further refined the "Fourteenth Amendment" application criteria in terms of (1) historical analysis of jury trial in criminal cases and, (2) contemporary practices among the states.[20] Appellee now argues and suggests to this Court that the criteria of Fourteenth Amendment *application* may be equally relevant for Fourteenth Amendment *justification*, and that the Massachusetts jury procedure is, itself, a basic and fundamental procedure which has its roots clearly within the Anglo-American regime of ordered liberty in a constitutional-historical sense, as well as in the light of contemporary developing jury procedures of several American States. In brief, if the Fourteenth Amendment requires that a limitation be imposed, or a procedure be secured, upon these criteria, Massachusetts suggests that its existing procedure can be justified as adequate by the same criteria, providing a basic and fundamental right in a basic and fundamental mode.

A. *The Colonial-Constitutional Experience*

The Massachusetts practice of affording criminal defendants a jury trial after preliminary adjudication by a judge (or magistrate) acting alone was first codified in

[20] The Court reviewed the history of trial by jury in criminal cases by reference to historical treatises and legislative history of the debates and amendments surrounding various federal provisions, and indicated, as well, that the constitutions adopted by the original states were examined. 391 U.S. at 151-53. The Court also referenced contemporary state law with respect to the right to jury trial in serious criminal cases. 391 U.S. at 154.

1647 when the General Court enacted a provision affording all persons the "libertye" of an:

> Appeal from the sentence of one magistrate . . . and if the point of appeal be in matter of law then to be determined by the bench; if in matter of fact by the bench and jury.

THE BOOK OF THE GENERAL LAWS AND LIBERTYES CONCERNING THE INHABITANTS OF MASSACHUSETTS, PUBLISHED IN CAMBRIDGE ACCORDING TO AN ORDER OF THE GENERAL COURT 2 (1660). Our research of legislation enacted since 1647 discloses that this provision has never been repealed and that the trial *de novo* procedure, with some modification, has continued in use from that date to the present.[21] See *Whitmarsh* v. *Commonwealth*, 1974 Mass. Adv. Sh. at 1411; *Jones* v. *Robbins*, 8 Gray 329, 341 (1857). The right of "appeal" was clearly not an unfettered one in colonial pratice and has been the subject of critical commentary. Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 HARV. L. REV. 917, 938-44 (1926).[22]

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[21] Ch. 51 §3 [1783] Mass. Stat.; Ch. 70 § 1 [1831] Mass. Stat.; Ch. 85 §28, Ch. 87 §36, Ch. 138 §1 [1836] Rev. Mass. Stat.; Ch. 166 §2 [1845] Mass. Stat.; Ch. 31 [1849] Mass. Stat.; Ch. 116 §32 and Ch. 173 §§1, 4 [1860] Mass. Gen. Stat.; Ch. 154 §39 and Ch. 155 §§58, 61 [1882] Mass. Pub. Stat.; Ch. 396 §47 [1893] Mass. Stat.; Ch. 431 [1894] Mass. Stat.; Ch. 490 §3 [1897] Mass. Stat.; Ch. 219 §22 [1902] Mass. Rev. Laws; Ch. 319 [1905] Mass. Stat.; Ch. 652 [1913] Mass. Stat.; and Ch. 216 §4 [1929] Mass. Stat.

[22] However, we suggest that the authors' research does not seem to include the historical fact that many of the impediments to an actual exercise of the jury-trial right had been eliminated during the colonial period and prior to the framing of the Massachusetts and Federal Constitutions. See, *e.g.*, Ch. 4, Acts and Resolves of 1724-25 (permitting amendment to the appeal so as to preclude dismissal on technical grounds); Ch. 15, Acts and Resolves of 1741-42 (eliminating requirement that a writing containing the reasons of appeal

The exact parameters of the procedure in early practice as regards magistrates' subject-matter jurisdiction and limitations upon the punishments that might be imposed are elusive and, in some respects, difficult to establish categorically in modern terms due to the fragmented approach of early legislators in codifying the criminal law and incommensurabilities arising from social, economic, and technological change. However, after a review of the legislation of the colonial and constitutional periods, it appears fair to state that, at least with respect to the core offenses against the public order and peace, against property, and against persons, the matters entrusted to the trial *de novo* procedure then, and those entrusted to the procedure now, are quite comparable. For example, during the colonial and constitutional experience, justices of the peace, sitting outside the General Sessions of the Peace, were authorized to proceed to a preliminary adjudication in cases where the offense was: participation in a riotous or tumultuous assembly where a building was torn down;[23] a liquor law violation;[24] an assault and battery not of a "high and aggravated nature";[25] receiving

be filed or produced). The latter provision reduced costs based upon the number of pages filed. See Ch. 23, Acts and Resolves of 1775-1776. Also, appellee has calculated that forty of the fifty-nine shillings were for jurors fees and that these fees need not have been advanced, nor would have been assessable against the defendant, in the event of an acquittal. In general, see preambles to these ameliorative acts for reflection of a legislative concern that the appeal right be unfettered.

[23] Ch. 17, Acts and Resolves of 1750-51 (maximum punishment: whipping, one year imprisonment in the county house of corrections at hard labor, and another public whipping every three months during the term of imprisonment); Ch. 26, Laws and Resolves of 1794 (re-enactment with some modification). See *Commonwealth* v. *Twombly*, Boston Municipal Court 1830, reported in Thatcher's Criminal Cases 225 (1845) (Thatcher, J., reviewing common-law and legislative history of the offense.)

[24] Ch. 6, Acts and Resolves of 1742-43 (maximum fine: twenty pounds sterling).

[25] Ch. 51, Laws and Resolves of 1783.

stolen government property;[26] or, a petty larceny or offense of similar degree.[27]

Today, the district and municipal courts of Massachusetts, the successor courts to the General Sessions of the Peace, continue to have jurisdiction over these offenses which still are among those that mark the jurisdictional limits of the authority of these courts. See Mass. Gen. Laws, Ch. 218, §26; Ch. 267, §7; Ch. 265, §13A; Ch. 266, §§ 30, 60.

The New Hampshire two-tier jury procedure has been traced by that state's Supreme Court to a 1646 law of the Massachusetts Colony, *State* v. *Jackson*, 69 N.H. 511 (1898), although it is clear that the New Hampshire practice enjoys a history separate and apart from the Massachusetts law:

> * * * In 1679, immediately after Charles II discontinued the jurisdiction of Massachusetts in the New Hampshire territory, the general assembly of the Province of New Hampshire enacted, "That Any one of the Council [that is, the council provided for by the King's Commission to President Cutt] may hear

[26] Ch. 36, Acts and Resolves of 1776-77 (maximum fine: three-times value of property stolen).

[27] THE BOOK OF THE GENERAL LAWS AND LIBERTYES OF THE INHABITANTS OF MASSACHUSETTS, supra, at 7 (maximum punishment in 1660: whipping and fine of up to forty shillings; but, by the end of the constitutional period the maximum fine had been increased to twelve hundred eighty shillings. Ch. 37, Acts and Resolves of 1779-80).

Our research has disclosed that long-term imprisonment was rarely imposed in colonial Massachusetts. The one exception appears to be the three-year term authorized for mailing a threatening letter to extort. Ch. 7, Acts and Resolves 1749-1750. Otherwise, excepting for the imposition of heavier fines, the penalty of next severity (outside of the jurisdiction of a justice of the peace) appears to have been the death penalty. See, *e.g.*, Ch. 2, Acts and Resolves of 1721-1722 (death penalty for second offense of trading with the Indians); and, Ch. 18, Acts and Resolves 1736-37 (death penalty for third offense of theft).

> & determine such smaller Thefts & pilferings, as exceed not the damage or fine of fforty shillings; or penalty of Stocking or Whipping, not exceeding Ten stripes; or only legal admonition, as he shal see cause; Saving liberty of Appeal to the Delinquent." 1 Laws, *ed.* of Batchellor, editor and compiler of Early Province and State Papers, *p.* 17, *s.* 7. By another enactment this jurisdiction was extended to all criminal cases in which the punishment did not exceed that above mentioned. *Ib.*, *p.* 22, *s.* 24.

69 N.H. at 514.

Several decisions of the New Hampshire Court seem to best describe the office of the justice of the peace in New Hampshire, the criminal jurisdiction of the justices at the time of the formation of the New Hampshire Constitution in 1784, and the modification of the jurisdiction of the justices during the period following the revolution. See, *Opinion of the Justices*, 41 N.H. 550 (1860); *State* v. *Ray*, 63 N.H. 406 (1885); *State* v. *Griffin*, 66 N.H. 326 (1890); *State* v. *Gerry*, 68 N.H. 495 (1896); *State* v. *Jackson*, *supra*; *Wilmarth* v. *King*, 74 N.H. 512 (1908); *State* v. *Ring*, 106 N.H. 509 (1965); *State* v. *Despres*, 107 N.H. 297 (1966). And, although the cases have concerned, in large measure, the scope of jurisdictional authority which may be delegated to the municipal or district court in view of Article V of the Bill of Rights of the New Hampshire Constitution,[28] it seems fair to say that the New Hampshire Court has never questioned the historical precedent of two-tier criminal adjudication, "provided the

[28] The provision of the constitution relied upon is as follows: No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land. N.H. Const., Bill of Rights, art. 15.

right to trial by jury, such as the Constitution intends, is secured to everyone in the last resort . . . .'' *Opinion of the Justices,* 41 N.H. at 552, and "final judgment cannot be enforced for the commission of any police offense, however trivial, until the appellant has been convicted by a jury of his peers." *State* v. *Ray,* 63 N.H. at 407.

In and prior to 1784, a New Hampshire justice of the peace had general authority to try and determine those criminal offenses that were punishable by a fine not exceeding forty shillings, by whipping or sitting in the stocks. *Wilmarth* v. *King,* 74 N.H. at 513. However, specific statutes authorizing the punishment of six months imprisonment by a justice of the peace are to be found, even antedating the constitution. New Hampshire Laws, 63, 64, 65 (1780). See *Wilmarth* v. *King, supra.* See also, New Hampshire Laws, Ch. 45, §§ 3, 4 (1828). Finally, the appellee suggests that the nature of the following offenses within the jurisdiction of the justices of the peace should be noted (these examples all being laws of 1771 cited in *State* v. *Jackson,* 69 N.H. at 516-17): drunkenness; stealing (where the damage did not exceed forty shillings); "affrayers, rioters, disturbers or breakers of the peace . . ."; striking or smiting another; and, "assaulting a woman in the fields, streets or lanes . . . ."[29]

Decisions of the Supreme Court of Vermont, and some available portions of early Vermont legislation, establish that two-tier criminal jury procedures were a part of the constitutional experience in Vermont.

> The first constitution of Vermont was adopted in 1777. The act of the legislature of 1786 empowered the justices of the peace to try certain pleas and actions of a criminal nature, and limited their juris-

[29] The fines and penalties for these offenses are contained in the opinion of the court at 69 N.H. 516-17.

> diction. It also provided that every person . . . aggrieved by the sentence of a justice in a criminal action, might, on giving security, remove the cause by *certiorari*, to the supreme court (where there was then a trial by jury.) [sic] there to be tried on the merits. The act of 1789 allowed an appeal from the judgment and sentence of a justice to the county court in all criminal causes.

State v. *Peterson*, 41 Vt. 504, 520-21 (1869). The "county court" was a jury court. See "An Act Regulating Juries and Jurors, 22 Feb. 1779", reprinted in XII Laws of Vermont 1777-1780, at 117 (Soule, ed. 1964). See also *Lincoln* v. *Smith*, 27 Vt. 328 (1855); Act of June 21, 1782, reprinted in XIII Laws of Vermont 1781-1784, at 102-03 (Williams, ed. 1965).

Our research discloses that the states of Connecticut and Rhode Island and the District of Maine similarly employed a trial *de novo* procedure for furnishing, during the colonial period, jury trial to criminal defendants who were tried first before a magistrate or justice of the peace without a jury. In Connecticut that procedure seems to date from at least 1702. See *Goddard* v. *State*, 12 Conn. 448, 454 (1838); Colonial Records of Connecticut 1689-1706, at 545. In Rhode Island our earliest reference is 1718. Acts and Laws of Rhode Island, 1663-1767, at 36, 44 (1767).[30]

[30] Again, the appellee requests that the Court note the nature of the offenses for which the trial *de novo* procedure was provided in jurisdictions where the defendant was given a general right to a trial by jury subsequent to a preliminary adjudication by a magistrate or magistrates. For further example, in the colonial practice of Rhode Island, a preliminary summary adjudication was provided for in cases of a theft not exceeding ten pounds sterling (for which the defendant might be punished by "whipping, fining, and banishing" just as if the conviction had been by a jury verdict at the General Sessions of the Peace), assault and battery, and firing a gun or throwing fireworks into a crowd. Acts and Laws of Rhode Island 1663-1767, at 41, 64, 120 (1767).

And, in the District of Maine, 1783. See *State* v. *Sklar*, Me. 317 A.2d 160, 170 (1974); *Johnson's Case*, 1 Me. 230 (1821). There is also evidence that a trial *de novo* procedure for providing a jury trial was employed in some form in Pennsylvania, Virginia and Delaware during the colonial and constitutional periods.[31]

[31] Our research of Pennsylvania legislation of the colonial and constitutional periods does not disclose a uniform jury practice in the case of all criminal offenses. There was, however, provision for a general right to appeal to the Quarter Sessions for a jury trial in quasi-civil proceedings. Act of February 21, 1736, reprinted at 4 Statutes at Large of Pennsylvania 291 (limiting the jurisdiction of justices of the peace at five pounds sterling, with a right of appeal to a jury in cases involving over forty shillings).

In addition, a trial *de novo* procedure for furnishing a jury trial was, with fair consistency, provided for criminal offenses of intermediate seriousness. See *e.g.*, Act of August 21, 1719, reprinted at 3 Statutes at Large of Pennsylvania 229, 233-34; Act of February 24, 1721, reprinted at 3 Statutes at Large of Pennsylvania 246 (petty larceny punishable by twenty shilling fine, whipping and imprisonment); Act of August 15, 1730, reprinted at 4 Statutes at Large of Pennsylvania 194 (blocking a river); Act of October 4, 1788, reprinted at 13 Statutes at Large of Pennsylvania 160 (commercial fishing law violations punishable by a five pound fine or two months imprisonment); Act of April 22, 1794, reprinted at 15 Statutes at Large of Pennsylvania 110, 115-16 (keeping a gambling establishment punishable by a fine of twenty-six dollars).

The use of the trial *de novo* procedure for furnishing a jury trial where it is constitutionally required in quasi-civil actions has been considered and affirmed by the Pennsylvania Supreme Court. *Emerick* v. *Harris*, 1 Binney 416 (1808).

The cornerstone of Virginia's criminal justice system was the monthly court which was formed in 1623 with the appointment of eight designated commissioners, of whom three were to be a quorum. Act of March 20, 1629, reprinted at 1 Hening's Statutes at Large 132 (1823); Act of March 1, 1631, reprinted at 1 Hening's Statutes at Large 168-169 (increasing jurisdiction to causes involving up to five pounds sterling excepting those involving life or limb). In 1642 the monthly courts became county courts and a single commissioner was given cognizance of causes involving twenty shillings or two-hundreds pounds of tobacco or less. Act of June, 1642, reprinted at 1 Hening's Statutes at Large 273. Also, in 1642, all persons were given what appears to have been an unqualified right to a jury trial. *Ibid.*

In 1645 the Virginia "county courts" were given jurisdiction of all cases and ordered to make jury trials available. Act of November

In partial summary, although there may have been no strict consensus among the colonies as to the mode in which the right to jury trial was to be afforded, the trial *de novo* mode for offenses of intermediate seriousness was a very substantial part of the colonial experience and was, appellee suggests, clearly within the under-

20, 1645, reprinted at 1 Hening's Statutes at Large 303. It is not clear how the last three acts were reconciled in practice. Possibly, a trial *de novo* procedure had already been implemented. In any event, a trial *de novo* procedure for furnishing a jury trial was formally implemented in 1658. Act of March 13, 1658, reprinted at 1 Hening's Statutes at Large 435. Appellee notes that the subject matter jurisdiction of one and two commissioners at a preliminary adjudication was increased to three hundred fifty and one thousand pounds of tobacco respectively with the implementation of these procedures. We must further note that the Virginia legislation during this period did not distinguish between criminal and civil actions procedurally, all penal laws being enforced through *qui tam* proceedings involving informers as well as victims.

This practice was to be short-lived, however. In 1661 a new colonial government, averring a reverence for the common law of England, adopted that law, repealed all previous laws, provided that the commissioners were from then on to be called "justices of the peace" and have the same powers as English justices, and reduced their jurisdiction in summary proceedings to causes involving twenty shillings or two hundred pounds of tobacco, or less, in which causes their judgment was to be "final." Acts of March 23, 1661, reprinted at 2 Hening's Statutes at Large 41, 61-62, 72. It does not appear that Virginia again established a trial *de novo* procedure until the post-constitutional period.

The post-constitutional procedure was held valid under the Sixth Amendment and the Virginia Constitution on the ground that the right to a jury trial is afforded if an unfettered right of appeal is provided. *Brown* v. *Epps*, 91 Va. 726 (1895) (distinguishing *Callan* v. *Wilson*, *supra*, on the ground that Article III, Section 2 of the United States Constitution requires that all federal trials "shall be by jury" which literally leaves no room for any adjudication in the absence of a jury).

Information on early Delaware practice is quite sparse. Much of the early penal legislation is somewhat cryptic. It is clear that the Delaware justices of the peace had jurisdiction over some offenses of intermediate seriousness, and although a right to appeal for a trial by jury in the quarter sessions is not expressly given for all offenses, the right is expressly afforded in the more comprehensive legislative enactments and in language that suggests the right may have been generally available. Laws of the Government of New

standing of the framers of our Federal Constitution. Indeed, we suggest that the *de novo* mode was within the experience and understanding of those whose precepts as regards the jury-trial right were the more developed: in the "*de novo* states" it appears that jury trial was provided for *all* offenses, petty and serious.

B. *Contemporary State Practice*

The contemporary practices of the states with respect to jury trial have been the subject of examination by this Court in several recent cases, notably: *Duncan* v. *Louisiana, supra; North Carolina* v. *Pearce, supra; Baldwin* v. *New York, supra; Williams* v. *Florida, supra; Apodaca* v. *Oregon, supra;* and *Colten* v. *Kentucky, supra.* And our examination of the parties' briefs in these cases indicates that the Court has received considerable analysis, on a state-by-state basis, of the criminal jury procedures of most of the states. See, *e.g., Duncan* v. *Louisiana, supra;* Brief for Appellant, pp. 3a-8a; Brief for Appellee, pp. 101-113.

The appellee has examined contemporary state practice and suggests that a *de novo* procedure, comparable to the Massachusetts procedure, is currently being utilized

Castle, Kent and Suffolk upon Delaware 1700-1749, at 139, 159, 184, 194, 218 (Franklin and Hall, eds. 1752); Laws of the Government of New Castle, Kent and Suffolk upon Delaware 1753-1762, at 146, 316, 321, 323 (Adams, ed. 1763) (with October 1763 Session to October 1774 Session Supplements).

Records of legislative enactments, or case law, or both, concerning the colonial and constitutional periods were available to appellee for New York, Maryland, New Jersey and Georgia. A search of this material did not disclose the use of a trial *de novo* procedure for providing a jury trial or a provision for a general right to a jury trial in these states. Complete records of the colonial practice of South Carolina and North Carolina were not available. However, it is known that North Carolina provided a trial *de novo* procedure for offenses of intermediate seriousness as early as 1868. See *State* v. *Powell*, 86 N.C. 640, 642 (1882).

by several states including, at least, Arizona,[32] Arkansas,[33] Alabama,[34] Kansas,[35] North Carolina,[36] New Hampshire,[37] Pennsylvania[38] and Virginia.[39] Appellee acknowledges that the ostensible jurisdiction of the Massachusetts

[32] Ariz. Rev. Stat. §§22-371 through 22-374 establish the *de novo* appeal to the superior court from the final judgment of a justice or police court; however, the "appeal" is not always *de novo*, *i.e.*, if a transcript of the proceedings in the lower court has been maintained, the "appeal" may be upon that record based upon the superior court's evaluation of the sufficiency and condition of that record. The jurisdiction of the justice of the peace courts is contained in Ariz. Rev. Stat. §§22-301.

[33] Ark. Stat. §§44-115, -116, -501 and -509 establish the *de novo* procedure of appeal to the circuit court. See *Cableton* v. *State*, 243 Ark. 351, 359 (1967). However, the initial jurisdiction of the lower "tier" appears to be restricted to violations of municipal by-laws and ordinances. See Ark Stat. §§44-115, -116.

[34] See Ala. Const. art. I, §§6, 11 (1901). The jurisdiction of the first tier (the "county court") is defined in Ala. Code Ann. tit. 13 §321; see *Leonard* v. *State*, 43 Ala. App. 454 (1966) and Ala. Code Ann. tit. 1 §7 and tit. 13 §326. The latter citation appears to define the *de novo* right. Appellee also notes that second degree manslaughter appears to be a misdemeanor in Alabama and subject to adjudication, in the first instance, at the lower court level without a jury.

[35] The *de novo* procedure appears in Kan. Stat. Ann. §§22-3609, -3610. See *State* v. *Parker*, 213 Kan. 229, 230, 233, 235 (1973).

[36] N.C. Gen. Stat. §§7A-177.1, -196, -271, -272, 15-290.

[37] The *trial-de-novo* procedure and enabling legislation is explained in *State* v. *Despres*, 107 N.H. 297 (1966). See N.H. Rev. Stat. §§502:18, 502A:11, 502A:12. The jurisdiction of the district or municipal first tier is limited to crimes for which the maximum penalty is fine not exceeding one thousand dollars or imprisonment not exceeding one year or both. *Ibid.*

[38] Pa. Code tit. 234, Rules 51, 67, 6001, 6006, 6010. The municipal court has jurisdiction of all criminal offenses where the punishment that might be imposed is five years or less. After the imposition of sentence the municipal court judge shall notify the defendant of his right to appeal for a trial *de novo* by jury. If the defendant does appeal, the district attorney must proceed to a grand jury and, upon return of an indictment, proceedings continue as in other cases involving indictable offenses.

[39] Va. Code Ann. §§16.1-123, -124, -125, -132, -136. See *Commonwealth* v. *Blais*, 113 Va. 760 (1912). In Virginia, any person convicted in a court not of record, of an offense not felonious, has a right to a *de novo* jury trial in a circuit court (even if the conviction resulted from guilty plea, rather than trial).

"first tier" seems to represent (with the possible exception of Alabama) the extreme with respect to powers of fines and incarceration. However, the concept of *de novo* adjudication, in a procedure comparable to the Massachusetts system in respects other than potential sentencing, seems to be recognized as a legitimate form of jury procedure by a substantial number of states.[40]

[40] Appellee has suggested, and, hopefully established, that the subject matter or "core offenses" cognizable by colonial justices of the peace are substantially comparable to the subject matter jurisdiction of the present Massachusetts District Courts and the Boston Municipal Court. It does appear, however, that the *ostensible* authority of the modern justice has been substantially expanded in terms of money fine amount and potential time of incarceration. This is, of course, an important consideration, especially in view of the recognized distinction between "petty" and "serious" offenses and the doctrine of *Callan* v. *Wilson*, *supra*. Appellee argues, however, that the practical expansion of "lower tier" jurisdiction is justified by social, technological and procedural advance, as well as by need, but further, that the *actual* expansion is far less than the *apparent* expansion.

The expansion of magistrates' jurisdiction was examined by the New Hampshire Supreme Court in *State* v. *Jackson*, *supra*. That court noted that, with some exceptions, in 1777 the largest fine which a New Hampshire justice was authorized to impose was forty shillings, and that the longest definite term of imprisonment was three months, ". . . authority being given in certain cases to imprison in the house of correction for an indefinite term; . . ." 69 N.H. at 518. That court, in 1898, undertook to interpret the 1777 sentencing power in terms of subsequent authority of the justices in 1791, 1799, 1805, 1815, 1822, etc. The interpretation and examination took this form:

> In 1781, the Spanish milled dollar reckoned as six shillings, and other silver and gold in proportion, were made legal tender on all contracts made after that time, and for all debts contracted prior to the last day of January, 1777. Laws, *ed.* 1789, *pp.* 185, 187. The constitution provides that, in all cases where sums of money are mentioned in it, "the value thereof shall be computed in silver at six shillings and eight pence per ounce." Laws, *ed.* 1789, *p.* 30. Const., *art.* 96. It seems from the act of February 12, 1785, that the value of gold at that time was five pounds six shillings eight pence per ounce, or, when compared with silver, as sixteen to one. Laws, *ed.* 1780, *p.* 338; *ed.* 1789, *p.* 187. The money of account was changed from the English system to the decimal or United States system in

II. The Massachusetts Jury Procedure Effects this Court's Enunciation of the Purpose and Function of Jury Trial in America.

In addition to an examination of historical and contemporary practices among the states, the Court, in recent cases touching upon the nature of the jury right, has studied the purpose and function of the jury in contem-

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1792 (Act of Congress of April 2, 1792, *c.* 16, *s.* 20; Laws, *ed.* 1797, *p.* 267); and the first United States silver dollar was coined in 1794. This dollar contained 371¼ grains of pure silver,—about the same quantity as the Spanish milled dollar. According to the rule of the constitution, forty shillings equaled six ounces of silver,—a quantity sufficient to make seven and three fourth United States Silver dollars.

69 N.H. at 518-19.

Appellee includes this New Hampshire analysis primarily to establish that a dollar-for-dollar comparison is difficult, if not totally impractical. Nevertheless, appellee asks that this Court, if such comparison be made, take note of the fact that the Chief Judge of the Vermont County Court was paid at the rate of ten shillings per day in 1780, and that an attorney in that court received for his labor four shillings per day. "An Act for Regulating Fees Novr. 3RD 1780" reprinted in XI Laws of Vermont 1777-1780, at 206. (Soule, ed. 1964).

And, should this Court compare the extreme of the present authority of a Massachusetts District Court Judge to imprison, the appellees ask that the following statement of the Rhode Island Supreme Court be noted:

> Suffice it to say that at the time of the adoption of the State constitution [1843] imprisonment in the State prison was the gravest punishment known to the law of the State for crimes less than capital crimes, and that it had succeeded to the former punishments of whipping, branding, and standing in the pillory.

State v. *Nichols*, 27 R.I. 69, 82 (1905).

In summary, appellee argues that the propriety of the present Massachusetts system should not be diluted because of ostensible, rather than actual, enlargements of jurisdiction as originally entrusted to justices of the peace. Appellee asks the Court to recognize that the Massachusetts procedure is not an imaginary scheme, but a functioning and developing process with a three-hundred year history, presently accommodating in excess of one million criminal matters each year. *Seventeenth Annual Report to the Justices*, *op. cit.*, *supra*, note 7, at 52.

porary society. In *Duncan* v. *Louisiana, supra*, the Court noted:

> * * * Perhaps because the right to jury trial was not directly at stake, the Court's remarks about the jury in *Palko* and *Snyder* [*Palko* v. *Connecticut*, 302 U.S. 319 (1937); and *Snyder* v. *Massachusetts*, 291 U.S. 319 (1934)] took no note of past or current developments regarding jury trials, [and] did not consider its purposes and functions . . . . 391 U.S. at 155.

The Court then stated the purpose (and its components) of the guarantee of jury trial in the Federal and State Constitutions: "a right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." [citing *Singer* v. *United States*, 380 U.S. 24, 31 (1965)] 391 U.S. at 155. The Court continued with categories of potential governmental oppression based upon history and experience:

1. unfounded criminal charges brought to eliminate enemies;
2. judges too responsive to the voice of higher authority;
3. protection against arbitrary action;
4. the corrupt and overzealous prosecutor;
5. the compliant, biased, or eccentric judge;
6. the exercise of plenary powers over the life and liberty of the citizen to one judge or a group of judges;
7. unchecked power; and,
8. arbitrary law enforcement,

concluding, *inter alia*, that: "even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely." 391 U.S. at 158.

In *Williams* v. *Florida*, 399 U.S. 78 (1970), the Court considered the question of whether the constitutional guarantee of a trial by "jury" necessarily required trial by exactly twelve persons, rather than some lesser number — in *Williams*, six. 399 U.S. at 86. In deciding the issue the Court stated:

> * * * The relevant inquiry, as we see it, must be the function that the particular feature performs in its relation to the purposes of the jury trial. 399 U.S. at 99-100.

The Court then reviewed the statement of jury purpose contained in *Duncan*, concluding:

> Given this purpose [to prevent oppression by the government], the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. 399 U.S. at 100.

The Court determined that there was little reason to think that these goals are *in any meaningful sense* less likely to be achieved when the jury numbers six, than when it numbers twelve. *Ibid.*

In *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), this Court considered the question of whether conviction of crime by a less-than-unanimous jury violated the right to trial by jury in criminal cases. 406 U.S. at 406. The Court examined relevant constitutional history, noting that conflicting inferences could be drawn therefrom, and stated:

> . . . that in determining what is meant by a jury we must turn to other than purely historical considerations. 406 U.S. at 410.

The Court's inquiry then explicitly focused upon the function served by the jury in contemporary society, and the enunciated jury "purpose" of *Duncan* and *Williams* was examined. The Court concluded that "a requirement of unanimity . . . *does not materially contribute* to the exercise of commonsense judgment." *Ibid.* [Emphasis added.]

In view of the "purpose and function" analyses of *Duncan*, *Williams*, and *Apodaca*, appellee suggests that it is appropriate in the instant case to examine the Massachusetts jury procedure to determine whether or not the "essential feature" of the jury is effected. The issue is governmental oppression and whether or not the Massachusetts system, in a meaningful sense, prevents such oppression by the interposition of the commonsense judgment of a body of laypersons between the accused and his accuser.[41]

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[41] An examination of the "trial *de novo*" cases decided in the state courts has provided little assistance. In *Manns* v. *Commonwealth*, 213 Va. 233 (1972), the Virginia court made no examination of history, nor analysis of jury purpose, in its consideration of this question. The court seemed merely to reject the argument that *Callan* v. *Wilson* became applicable to the states via *Duncan* v. *Louisiana*, citing to footnote 30 and the dissent of Mr. Justice Fortas. Also, in *State* v. *Halliday*, 109 R.I. 93 (1971), no examination of history or jury purpose is apparent; rather, the Rhode Island court concluded on the basis of *Duncan*, and *Baldwin* v. *New York*, 399 U.S. 66 (1970), that the "mandate of *Callan* is applicable to the states." 109 R.I. at 103.

Cases decided in federal courts bear only indirectly upon potential governmental oppression and, even less directly upon the question of jury purpose. In *Lemieux* v. *Robbins*, 414 F.2d 353 (1st Cir. 1969) (cited with approval by the court in *State* v. *Sparrow*, 276 N.C. 499 (1970)) the Circuit Court examined the "trial *de novo*" procedure in the state of Maine on the basis of a challenge deriving from this Court's determination of *North Carolina* v. *Pearce*, 395

An examination of the Massachusetts jury system discloses that an accused has an absolute right to a body of laymen whose judgment will stand between himself and his accuser after a preliminary adjudication at which he need do nothing.[42] In fact, the defendant obtains the dis-

U.S. 711 (1969). In its opinion, the Circuit Court made the following statement with respect to the practical nature of the *de novo* procedure:

> . . . [A] defendant gives up nothing by going to trial in the district court. Nor, unlike the situation in *Pearce*, need he demonstrate error, constitutional or other, in a first trial to secure a second trial, which very proof of error gives the state the opportunity to increase the punishment. Such is indeed a one way street. Here we deal with a two way street. Defendant has the benefit of two full opportunities for acquittal. If he fails to gain acquittal in the district court, his mere exercise of his right to "appeal" not only gives him a new trial but vacates the judgment and removes the entire case to the Superior Court. The state is willing to accept this in the long-run interest of reducing the load on the Superior Court. The defendant need not accept it at all. [Footnote omitted.] If he does accept it, both he and the state start at parity; should he elect to take advantage of a second and fresh opportunity, it does not seem unfair to us that, absent affirmative proof of vindictiveness, they should start again at parity. 414 F.2d at 355.

Although the statement is not explicitly addressed to the issue of governmental oppression, the appellee suggests that the Circuit Court's observation implicitly contraindicates government oppression in the *de novo* process.

In *Manns* v. *Coontz*, 451 F.2d 1344 (4th Cir. 1971), the Circuit Court affirmed a federal district court's refusal to grant relief on the basis of a claim that the Virginia *de novo* procedure was violative of *Duncan*. The basis of dismissal seems to have clearly been 28 U.S.C. §2283 and *Younger* v. *Harris*, 401 U.S. 37 (1971). However, the Court did consider the element of irreparable injury and the prosecutorial-oppressive criteria of *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), in reaching its decision. Appellee suggests that the Court's action at least implicitly contraindicates governmental oppression in the Virginia procedure.

[42] In *Callan* v. *Wilson*, 127 U.S. 540 (1888), this Court rejected a hypothetical system based upon the ". . . power to provide for several trials, by a court, without a jury, on several successive convictions, before allowing a jury trial." 127 U.S. at 555. Although the record in this case is slight, it is clear that several successive convictions are neither theoretically possible nor actually permissible in the Commonwealth of Massachusetts. The "appeal" and jury trial may

tinct adavantage of being able to discover the prosecution's case without having to disclose his own, while in no way jeopardizing his right to trial by jury. Although he cannot as of right *waive* a trial at the district court level, *cf., Lemieux* v. *Robbins, supra,* at 355, n. 4, he can certainly *avoid* a trial by merely listening to the Commonwealth's evidence without offering his own and, if found guilty, appealing, which is what appellant Costarelli did in this case. Brief for the Appellant, p. 9. On appeal, the district or municipal court proceeding becomes a nullity: the appeal "wipes out the lower court action entirely." *Mann* v. *Commonwealth,* 359 Mass. at 666.

Admittedly, the *de novo* procedure effects a minimal degree of restriction and, arguably, inconvenience.[43] We see, however, the question as one of oppression, and not of inconvenience: can it be said that the *de novo* procedure materially dilutes the function of a jury when the defendant may listen to the government's case, without disclosing his own, and have, immediately thereafter and of absolute right, the further community participation in the process of adjudication of guilt or innocence and the interposition of commonsense judgment of a group of laymen — and, at the same time have the possibility of immediate acquittal? We suggest that the answer should be in the negative. The function of the jury is preserved.

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be elected immediately by a convicted district court defendant and, as such, should be distinguished from the *possibility* of prolonged litigation which was suggested by this Court in *Callan.*

[43] The Commonwealth justifies the inconvenience by pointing out that the district courts are designed, in the interest of both the defendant and the Commonwealth, to provide speedier and less costly adjudications than are possible on the second level of the Massachusetts two-tier system. The *de novo* system alleviates the burden in the Superior Court, where the full range of constitutional guarantees is available to all on appeal. *Cf., Coltœn* v. *Kentucky,* 407 U.S. 104, 114 (1972).

III. This Case Does Not Require Consideration of the Right to a Speedy Trial.

The Court's opinion in *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967), established that the right to a speedy trial is "fundamental" and is imposed by the Due Process Clause of the Fourteenth Amendment on the States. And the Court, in *Barker* v. *Wingo*, 407 U.S. 514 (1972), undertook to "identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right." 407 U.S. at 530.

In the instant case the appellant has asserted that the interposition of a trial by magistrate prior to affording the accused a trial by jury is an unconstitutional imposition on the right to a speedy trial. Brief for the Appellant, p. 41. The appellee suggests, however, that if this Court determines that the concept of "jury" contemplates first-instance-every-instance jury trial, then a consideration of the appellant's speedy trial claim becomes unnecessary.

Alternatively, should the Court agree that the Massachusetts criminal jury procedure complies with the *Duncan* requirement, then it is suggested that the appellant's claim is without substance, as, among other things, the record in this fails to disclose any measurable period of time which can be assessed against the *Barker* v. *Wingo* factors. Indeed, the appellant acknowledges that the time delay in appeal to the misdemeanor session in the County of Suffolk is "short". Brief for the Appellant, p. 42, n. 44. We assume this to be an acknowledgment that it is the *de novo* aspect of the Massachusetts procedure to which the appellant primarily objects. Assuming, then, the propriety of that procedure, it is suggested that a "short" delay is inadequate as a claim of violation of the right to a speedy trial.

IV. The Massachusetts Criminal Jury Procedure Complies With The Fourteenth Amendment's Ban Against "Double Jeopardy".

The Fifth Amendment guarantee against double jeopardy is enforceable against the states through the Fourteenth Amendment. *Benton* v. *Maryland,* 395 U.S. 781 (1968). This is, appellee acknowledges, a fundamental guarantee. *Id.* at 795. However, as the Court noted in *North Carolina* v. *Pearce,* 395 U.S. 711, 719-721:

> At least since 1896, when *United States* v. *Ball,* 163 U.S. 662, was decided, it has been settled that this constitutional guarantee imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside. "The principle that this provision does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well-established part of our constitutional jurisprudence." *United States* v. *Tateo,* 377 U.S. 463, 465. [Footnote omitted.]

And further:

> Although the rationale for this "well-established part of our constitutional jurisprudence" has been variously verbalized, it rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean.

This rationale was applied to a two-tier system of criminal justice in *Colten* v. *Kentucky,* 407 U.S. 104 (1972). There the appellant had been convicted of a misdemeanor in the Kentucky two-tier system. On appeal to this Court, the appellant challenged, *inter alia,* the constitutionality

of the enhanced penalty he received after conviction at his "second-tier" trial. As to the appellant's double jeopardy argument this Court said:

> Colten's alternative contention is that the Double Jeopardy Clause prohibits the imposition of an enhanced penalty upon reconviction. The *Pearce* Court rejected the same contention in the context of that case, 395 U.S., at 719-720. Colten urges that his claim is stronger because the Kentucky system forces a defendant to expose himself to jeopardy as a price for securing a trial that comports with the Constitution. That was, of course, the situation in *Pearce*, where reversal of the first conviction was for constitutional error. The contention also ignores that a defendant can bypass the inferior court simply by pleading guilty and erasing immediately thereafter any consequence that would otherwise follow from tendering the plea. 407 U.S. at 119-20.

Appellee suggests that in determining that the imposition of a more severe penalty upon reconviction in Kentucky's two-tier system was constitutionally permissible, this Court held, *a fortiori*, that retrial and reconviction in the Kentucky two-tier system were constitutionally permissible.

In Massachusetts, as was the case in Kentucky, the defendant in a criminal trial 'appeals' to the second level of the two-tier system to receive a trial "in the criminal courts of general jurisdiction where the full range of constitutional guarantees is available." *Colten* v. *Kentucky*, 406 U.S. at 114. In Massachusetts, as was the case in Kentucky, the right to the second-tier is absolute and, at the defendant's behest the lower court proceedings are "wiped out entirely." *Mann* v. *Commonwealth*, 359 Mass. at 666. See *Colten* v. *Kentucky*, 406 U.S. at 113 n. 3.

Thus, appellee suggests, the Massachusetts *de novo* trial procedure does not violate the double jeopardy ban of the Fourteenth Amendment.

VIII. Conclusion

Upon the basis of the foregoing, the appellee suggests that the Court should dismiss this appeal because the Court is without jurisdiction, in that the judgment herein appealed is not a final judgment rendered by the highest court of Massachusetts in which a decision could be had.

Alternatively, the appellee suggests that the appeal should not be treated as a case upon petition for writ of certiorari; however, if so treated, that certiorari be denied.

Alternatively, if determination be made upon the merits, appellee suggests that this Court conclude that the appellant's claim is without merit in that he was afforded, under Massachusetts procedure, a jury trial within the requirements of the Fourteenth Amendment.

Respectfully,[44]

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[44] Counsel acknowledge, with gratitude, that John S. Legasey of the Northeastern University School of Law and Vernon C. Watters of the Harvard Law School have assisted the Commonwealth greatly in the preparation of this brief.

APPENDIX A

The Criminal Jurisdiction of the Massachusetts Courts

1. The "District Courts" of Massachusetts are created by a statute which geographically divides the Commonwealth into seventy-three districts. Mass. Gen. Laws, ch. 218, §1. Each of these seventy-three courts is a court of record and "of superior and general jurisdiction with reference to all cases and matters in which they have jurisdiction. . . ." Mass. Gen. Laws, ch. 218, §4. The criminal jurisdiction of the District Courts is defined as follows:

> District courts shall have original jurisdiction, concurrent with the superior court, of the following offenses committed within their respective district or otherwise made punishable therein: all violations of by-laws, orders, ordinances, rules and regulations, made by cities, towns and public officers, all misdemeanors, except libels, all felonies punishable by imprisonment in the state prison for not more than five years, the crimes mentioned in sections sixteen, seventeen, eighteen, nineteen, twenty-eight and forty-nine of chapter two hundred and sixty-six, and the crimes of forgery of a promissory note, or of an order for money or other property, and of uttering as true such a forged note or order, knowing the same to be forged. They shall have jurisdiction of proceedings referred to them under the provisions of section four A of chapter two hundred and eleven. Mass. Gen. Laws, ch. 218, §26.*

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* There is some justification for the suggestion that the Boston Municipal Court and the Massachusetts District Courts are separate and distinct courts, each of its own "system." For example, the District Courts were established by statute in 1893, and the Boston Municipal Court was established by statute in 1821. See, Seventeenth Annual Report to the Justices of the Supreme Judicial Court, pp. 3-4 (1973). However, under current Massachusetts law, Gen. Laws,

2. The "Superior Court" of Massachusetts is not a court of geographical definition, but rather of composition (Mass. Gen. Laws, ch. 212, §§1-6). The Superior Court was established by statute in 1859. The criminal jurisdiction of the Superior Court is defined as follows:

> The court shall have original jurisdiction of all crimes and appellate jurisdiction of crimes tried before a district court. Crimes committed in that part of Scituate described in chapter three hundred and ninety-four of the acts of nineteen hundred and twelve shall be within the territorial jurisdiction of the court both in Norfolk county and in Plymouth county, and arrests and service of process in such cases may be made by an officer qualified to serve criminal process in Cohasset. Crimes committed in any part of Cambridge, Watertown or Newton lying in the Charles river basin shall be within the territorial jurisdiction of the court both in Middlesex county and in Suffolk county. As amended St. 1953, c. 319, § 24. Mass. Gen. Laws, ch. 212, §6.

3. The intermediate appellate court, known as the Massachusetts Appeals Court, was created in 1972 by Chapter 740 of the Acts of 1972, Mass. Gen. Laws, ch. 211A. That court, subject to such further appellate review by the Supreme Judicial Court as may be permitted pursuant to Massachusetts law (Mass. Gen. Laws, ch. 211A, §11, or otherwise), has concurrent appellate jurisdiction with the Supreme Judicial Court, to the extent review is otherwise

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ch. 218, §1, the Boston Municipal Court is considered to be one of the District Courts of Massachusetts and, accordingly, appellee suggests that for the purposes of this brief, and indeed, this appeal, the Boston Municipal Court should be considered as the equivalent of a Massachusetts District Court unless a contrary position is explicitly noted because of some explicit and controlling distinction made in Massachusetts statutes or applicable case law. See, Brief for Appellant, p. 2, n. 1.

allowable, with respect to a determination made in the Superior Court (and others) in criminal cases, irrespective of whether sentence has been imposed, except in review of convictions for first degree murder or where a sentence of death or life imprisonment has been imposed. Mass. Gen. Laws, ch. 211A, §10. This jurisdiction is subject, however, to this *proviso:* that whenever two justices of the Supreme Judicial Court issue an order for direct review by the Supreme Judicial Court in any case on appeal, either at the request of one of the parties or at the court's own initiative, upon finding that the questions to be decided are:

> * * * (2) questions of law concerning the Constitution of the Commonwealth or questions concerning the Constitution of the United States which have been raised in a court of the Commonwealth; . . . ,

the case will be reviewed directly by the Supreme Judicial Court without the necessity of any prior hearing or decision by the Appeals Court on the merits of the issues sought to be reviewed.

4. The Supreme Judicial Court has "general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein." Mass. Gen. Laws, ch. 211, §3. And, Massachusetts statute expressly provides that "questions of law arising upon exceptions, report or appeal shall be heard and determined by the full court." Mass. Gen. Laws, ch. 211, §5.

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Fourteenth Amendment of the United States Constitution, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article XII, Constitution of Massachusetts:

No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Title 28, United States Code, Section 1257:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

Massachusetts General Laws Chapter 218, Section 27A:

[Trial by jury of six in certain courts]

Any defendant in a district court of Berkshire county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Central Berkshire.

Any defendant in a district court of Bristol county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the second or third district court of Bristol.

Any defendant in a district court of Essex county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the first district court of Essex or the central district court of northern Essex.

Any defendant in a district court of Hampden county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Springfield.

Any defendant in the first district court of northern Middlesex, the fourth district court of eastern Middlesex or the district court of Lowell found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Lowell.

Any defendant in the district court of Marlborough, the district court of Natick, first district court of southern Middlesex, the district court of central Middlesex or the second district court of eastern Middlesex found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the first district court of southern Middlesex.

Any defendant in the first district court of eastern Middlesex, the third district court of eastern Middlesex, the district court of Somerville, or the district court of Newton, found guilty of an offense or crime over which

the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the third district court of eastern Middlesex.

Any defendant in a district court of Norfolk county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of northern Norfolk or the district court of East Norfolk.

Any defendant in a district court of Plymouth county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Brockton.

Any defendant in a district court of Worcester county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the central district court of Worcester.

Such claim of appeal shall be in writing and shall constitute a waiver of any claim of appeal to a trial by jury in the superior court or other disposition in said superior court.

Any defendant found guilty in any of said district courts, of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six who has appealed to the superior court may, in the discretion of a justice of the superior court, at any time before trial on such appeal, claim a jury of six in the district court designated in paragraphs one through ten of this section. Such claim shall be in writing and shall constitute a waiver of any right to a trial by a jury in the superior court or other disposition in said superior court. When a claim for a trial by jury of six has been made under the provisions of this paragraph, the clerk of the

superior court shall forthwith forward to the clerk of the said district court all the papers in the case which have been filed in the superior court.

The justice presiding at such session over a jury of six shall have and exercise all the powers and duties which a justice of the superior court has any may exercise in the trial and disposition of such cases.

No justice so sitting shall act in a case in which he has either sat or held an inquest in the district court or otherwise has taken part in any proceeding therein.

Trials by such juries of six in a district court shall be held in the courthouse of said court or a courthouse of the superior court within the same county, and shall proceed in accordance with the provisions of law applicable to trials by jury in the superior court, except that the number of peremptory challenges shall be limited to two to each defendant. The commonwealth shall be entitled to as many challenges as equal the whole number to which all of the defendants in the case are entitled. Jurors shall be drawn from the pool of jurors available for the jury sessions in either civil or criminal sessions in the superior court. The district attorney for the district in which the alleged offense or offenses occurred shall appear for the commonwealth in all cases. The chief justice of the district courts shall arrange for the jury sessions of the said district courts and shall assign justices and special justices thereto, to the end that speedy trials may be provided for such appeals. In the event of a trial by a jury of six in a district court, review may be had directly by the supreme judicial court by a bill of exceptions, appeal, report or otherwise, in the same manner provided for trials by jury in the superior court. The defendant may elect to waive a jury of six in the manner provided by section six of chapter two hundred and sixty-three, but such waiver shall not revive any right to a trial by jury or other

disposition in the superior court which had been waived under the provisions of the eleventh or twelfth paragraphs, of this section.

The justice presiding at such session over a jury of six shall, upon the request of the defendant, appoint a stenographer, who shall be sworn, and who shall take stenographic notes of all the testimony given at the trial, and shall provide the parties thereto with a transcript of his notes or any part thereof taken at the trial or hearing for which he shall be paid by the party requesting it at the rate fixed by the chief justice of the district courts; provided, however, that such rate shall not exceed the rate provided by section eighty-eight of chapter two hundred and twenty-one. Said chief justice may make regulations not inconsistent with law relative to the assignments, duties and service of stenographers appointed for any district court, and any other matter relative to such stenographers. The compensation and expenses of said stenographer shall be paid by the county.

Massachusetts General Laws, Chapter 278, Section 18:

[Appeals in criminal cases to superior courts; recognizance]

Whoever is convicted of a crime before a district court may appeal the finding of guilty or the sentence imposed thereon to the superior court or may appeal to and claim a jury of six in a district court in accordance with section twenty-seven A of chapter two hundred and eighteen and at the time of conviction shall be notified of his right to take such appeal. The case shall be entered into the superior court on the return day next after the appeal is taken, and the appellant shall be released on personal recognizance or committed, in accordance with the procedures set forth in section fifty-eight of chapter two hundred and seventy-six,

until he recognizes to the commonwealth, in such sum and with such surety or sureties as the court requires, with condition to appear at the superior court on said return day and at any subsequent time to which the case may be continued, if not previously surrendered and discharged, and so from time to time until the final sentence, order or decree, and not depart without leave, and in the meantime to keep the peace and be of good behavior. If the appellant is not released on personal recognizance and is committed for failure to recognize, the superior court shall thereupon have jurisdiction of the case for the purpose of revising the amount of bail required as aforesaid. The appellant shall not be required to advance any fees upon claiming his appeal or in prosecuting the same. Notwithstanding any other provision of law, a defendant, after a finding of guilty in a district court, may appeal therefrom and shall thereafter be entitled to a trial de novo in the superior court or may appeal to and claim a jury of six in a district court in accordance with said section twenty-seven A.

Massachusetts General Laws, Chapter 278, Section 18A:

[Trial of misdemeanors in Suffolk county or in municipal court of Boston]

Any defendant, in any district court of Suffolk county or in the municipal court of the city of Boston, found guilty of a violation of a by-law, order, ordinance, rule or regulation made by a city or town or public officer or of any other misdemeanor, except libel, may appeal and claim a jury of twelve in the municipal court of the city of Boston. By claiming such appeal, the said claimant shall be deemed to have waived any claim of appeal to a trial by a jury in the superior court or other disposition in said superior court.

Any defendant, found guilty in any district court of Suffolk county or in the municipal court of the city of Boston, of a violation of any of the offenses enumerated in the first paragraph of this section who has appealed to the superior court, may, at any time before trial on such appeal, claim a trial by a jury of twelve in the municipal court of the city of Boston and by so doing shall be deemed to have waived any right to a trial by a jury in the superior court or other disposition in said superior court. When a claim for a trial by a jury of twelve in the municipal court of the city of Boston has been made under the provisions of this paragraph, the clerk of the superior court shall forthwith forward to the clerk of said municipal court of the city of Boston all the papers in the case which have been filed in the superior court.

The justice presiding at such session over a jury of twelve in said municipal court of the city of Boston shall have and exercise all the powers and duties which a justice of the superior court has, and may exercise in the trial and disposition of such cases.

No justice so sitting shall act in a case in which he has either sat or held an inquest in the district court or otherwise has an interest.

Trials by such juries of twelve shall proceed in accordance with the provisions of law and rules of court applicable to trials by jury in the superior court. The commonwealth shall be entitled to as many challenges as equal the whole number to which all of the defendants in the case are entitled. Jurors shall be drawn from the pool of jurors available for the jury sessions in the superior court for Suffolk county. The district attorney for the Suffolk district shall appear for the commonwealth in all cases. The chief justice of the municipal court of the city of Boston shall arrange for jury sessions in the said municipal court and shall assign justices and special justices thereto, to

the end that speedy trials may be provided for such appeals. In the event of a trial by a jury of twelve in the said municipal court, review may be had directly by the supreme judicial court, by a bill of exceptions, appeal, report or otherwise in the same manner provided for trials by jury in the superior court. Any person taking an appeal under this section shall be subject to the municipal court of the city of Boston in matters of recognizance. In such matters, the said municipal court shall have all of the powers and duties of, and shall proceed in the same manner as the superior court.